IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1990, c. H.19; and

IN THE MATTER OF THE COMPLAINT OF Albert Large
AGAINST the Corporation of the City of Stratford,
the Stratford Police Department, and
the Board of Police Commissioners,
dated February 19, 1982, alleging
discrimination in employment on the basis of age.

BETWEEN:

ALBERT LARGE,
Complainant,

and

CORPORATION OF THE CITY OF STRATFORD,
STRATFORD POLICE DEPARTMENT, and
BOARD OF POLICE COMMISSIONERS,
Respondents,

and

ONTARIO HUMAN RIGHTS COMMISSION,
Commission.

BEFORE: Robert W. Kerr, Chair,
Board of Inquiry

APPEARANCES: Kim Twohig,
Ministry of the Attorney-General,
for the Commission.

John W.T. Judson,
Lerner & Associates,
for the Respondents.

DECISION WITH RESPECT TO REMEDY

HEARING RESPECTING REMEDY

By a decision dated November 21, 1990, I held the termination of the employment of the Complainant as a Stratford police office on July 31, 1981 to have been in violation of the Human Rights Code. The Complainant's employment was terminated on the basis of a policy of mandatory retirement at age-60, which the Respondents conceded to be a prima facie violation of the Code. I found the policy did not constitute a bona fide occupational qualification and requirement.

At the commencement of the hearings prior to that decision, on the basis of an agreement between the parties, I ruled as a procedural matter that I would deal only with the question of liability in my initial decision and that the question of remedy, if any, would be dealt with separately after the matter of liability was resolved. Consequently, in my decision of November 21, 1990, I reserved jurisdiction with respect to the remedy. In an effort to prevent the matter from remaining at this stage for an extended period of time, however, I limited my reserve of jurisdiction to a period of six months.

Before the time limit I placed on my reserve of jurisdiction had expired, my decision was appealed to the Divisional Court. In response to an inquiry from the parties, I indicated by letter of January 14, 1991 that I interpreted the filing of the appeal to have the effect of staying the time limit on my reserve of jurisdiction pending the decision of the Court. By letter of November 19, 1991, I was asked by the parties to reconvene the hearing for the purpose of submissions with respect to remedy and to render a decision on the remedy prior to the actual hearing of the appeal. Further evidence and the submissions of the parties with respect to remedy were subsequently heard on January 24, 1992.

ISSUES

The evidence as to the loss incurred by the Complainant consisted primarily of an analysis of the financial circumstances prepared by Peat Marwick Thorne, Chartered Accountants, submitted as Exhibit D-2. In essence, this analysis calculated the employment income the Complainant would have received after his actual retirement if he had continued in employment as a Stratford police officer until age-65 ($183,747), and the net loss of pension benefits the Complainant can expect to receive through his current life expectancy as a result of being retired at age-60, rather than age-65, allowing an offset for additional contributions ($10,881). This produced a total of $194,628 for loss of income.

The analysis in Exhibit D-2 did not include any calculation with respect to interest on past loss of income. The Commission made submissions with respect to interest based, for the most part, on

the rates of interest prescribed for judgments under the Rules of Practice.

The position of the Respondents with respect to both the analysis of loss of income in Exhibit D-2 and the submissions with respect to interest made on behalf of the Commission was that these represented fair estimates of the amounts involved. The Respondents, however, made various submissions to the effect that compensation should not be awarded against the Respondents for substantial portions of these amounts on legal grounds.

The Respondents submitted that there should be no compensation for loss of income during 1981 because, while expressing unhappiness with mandatory retirement in 1981, the Complainant never indicated any intent to make a legal claim to continued employment until he approached the Commission and filed a complaint on February 19, 1982 and subsequently asked to return to his employment around March 1, 1982.

The Respondents also submitted that compensation for loss of employment income during the period from actual retirement until the Complainant reached age-65 should be reduced because of failure of the Complainant to mitigate. Cross-examination of the Complainant revealed that, although he made some effort to obtain alternative employment during the period before he filed the complaint, he did not engage in further such efforts after filing the complaint, with a couple of possible exceptions that I will elaborate upon later.

Finally, the Respondents submitted that there should be no payment of interest for the period since 1986 because it should not be held responsible for loss caused by the excessive delay in the adjudication of the complaint. The complaint had originally been scheduled for hearing in June, 1985 in conjunction with similar complaints involving firefighters. It was not heard at that time when the Respondents objected to this joinder of hearings and asked that dates be set for a separate hearing. There ensured a series of delays, including two replacements of the Board, before the actual hearing before me commenced in February, 1989. Much of this delay was attributable to the administration of the Board of Inquiry process, although the causes of delay may have been as much systemic to the process as they were within the control of any person.

In addition to the claim for loss of income, the Commission submitted that the Complainant should be compensated for injury to his psychological well-being or, in other words, mental anguish. There was evidence that the Complainant suffered from depression after his retirement. The Respondents submitted that this was not a proper case for such compensation since they had acted in accordance with what they genuinely believed to be their legal rights. The Respondents also submitted that the mental anguish

experienced by the Complainant was a consequence of the fact of retirement itself, which would have occurred eventually anyway, and not because of the timing of the retirement which resulted in violation of the Code.

MENTAL ANGUISH

The issue of mental anguish is, in this case, relatively easy to resolve. Thus, I will deal with it first.

There is a question of legal interpretation relating to the power of a Board of Inquiry to award compensation for mental anguish in this case. When the events giving rise to the complaint occurred, the Ontario Human Rights Code conferred remedial power in the following terms:

> 19. The board, after hearing a complaint, ...
>
> (b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.

The current provision of the Code respecting compensation, which first came into effect in 1982 is:

> 41. ... the board may, by order, ...
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

The parties were agreed that, if there is any relevant difference in the remedial authority of a Board of Inquiry under the Code at the time of the Complainant's retirement and such authority under the present Code, this was a matter of substance which would be governed by the provisions of the Code in force in 1981. On a superficial examination, this raises a doubt as to whether compensation for the depression suffered by the Complainant can even be considered since this would constitute mental anguish which is not mentioned in the pre-1982 legislation.

A fuller examination of the state of human rights law in Ontario before and after the statute reform which came into effect in 1982 indicates that the new law was a combination of codification and clarification of the existing law with some law reform. Thus, the insertion of the specific reference to mental anguish into the new

law does not mean that such awards were unavailable prior to 1982. The state of the law on compensation for mental anguish prior to 1982 was that compensation was available. Boards of Inquiry, however, were often frugal when awarding such compensation, although a substantial award was possible if there was sufficient evidence to support such an award.

Applying that law to this case, I conclude that this is not an appropriate case to award compensation for the mental anguish suffered by the Complainant. A review of the evidence of the depression suffered by the Complainant indicates that this was indeed a reaction to retirement itself and was not specifically related to the unlawful timing of the Complainant's retirement. Thus, it was not attributable to the violation of the Complainant's rights under the Code.

Moreover, if the evidence supports any finding of an additional substantial impact upon the psychological well-being of the Complainant as a result of the timing of his retirement, it seemed to relate to the disappointment of his aspirations with respect to pension income. In so far the remedy for loss of income will fulfil those aspirations, it should serve in a substantial way as a remedy for this mental anguish as well. Considering the cautious approach to compensation for mental anguish under the pre-1982 law, I do not consider this an appropriate case to order any separate financial compensation for this element.

DELAY IN FILING OF THE COMPLAINT

I am sympathetic to the Respondents' submission that the compensation of the Complainant should be reduced because of the delay by the Complainant in announcing his intention to make a legal claim to continued employment. While the Complainant did make known to the Respondents that he would like to continue his employment, all of his communications to this effect prior to filing a complaint with the Human Rights Commission appear more in the nature of an appeal for dispensation from the mandatory retirement policy, rather than any indication that he claimed a legal right to continued employment. From the Respondents' perspective, this delay in asserting any legal claim was potentially prejudicial since the practical difficulties in continuing or reinstating the Complainant's employment would increase significantly as time passed.

On the other hand, any party which engages in a *prima facie* violation of the *Code* should recognize the risk that a complaint may ensue and that potential complainants, for a variety of reasons, may delay in asserting their rights. In this case, in particular, the provision for a *bona fide* occupational qualification and requirement left much uncertainty as to whether the Complainant had any legal right to continued employment.

Thus, at the time of actual retirement, the Complainant could easily have assumed that the Respondents were acting within their rights and that there was no legal claim to be asserted. That he did in fact so assume is evident from a letter he wrote to the Police Commission on July 16, 1981, although there is no indication in this letter as to whether he had taken into account the provisions of the Code.

In light of the Respondents' submissions on this issue, I have carefully searched the record for any evidence of why it was that the Complainant initially did acquiesce in retirement and assert no legal claim, and then later changed his mind and decided to file a complaint under the Code. Apart from his apparent initial assumption that the Respondents were within their legal rights, the evidence provides no answer to this question.

I can only conclude that, sometime after his letter of July 16, 1981, and probably not long before he filed the complaint on February 19, 1982, the possibility of making a complaint came to the Complainant's attention and he decided to pursue it. Since the existence of other complaints involving mandatory retirement of firefighters and police officers at about the same time is on the record, it may well be that there was some publicity around this issue which brought it to the Complainant's notice.

Given the potential prejudice to the Respondents as a result of the delay in the initiation of the complaint, I have considered what effect this might have on the remedy. While complaints should be filed promptly, complainants are entitled to a reasonable period of time after the violation occurs to decide whether to take action. The statute itself now addresses this question by providing that complaints filed within six months of the violation may proceed as a matter of course, while in the case of complaints filed more than six months after the violation the Commission should address its mind to the question of whether the complainant has acted in good faith and without substantial prejudice to other parties. There was, however, no such express time limit in the Code when this complaint was filed.

The termination of the Complainant's employment did not finally occur until July 31, 1981. The complaint was filed on February 19, 1982. While this is slightly more than the six-month limit that was subsequently made law, I do not think the delay was unreasonable at the time. The evidence indicates that the Complainant was suffering from depression for some time after his retirement. This may well have inhibited his ability to think about other strategies, like the complaint, to deal with his situation.

While the Complainant's letter of July 16, 1981 did indicate to the Respondents that he was acquiescing in the decision to enforce

mandatory retirement upon him, I do not think it provides a basis for denying compensation for loss of employment for the period until the complaint was filed. It is clear from the letter that the Complainant was proceeding on the basis that the provision for mandatory retirement in the collective agreement was binding. This was, of course, a mistake of law on his part, but it was not his responsibility to advise the Respondents as to their legal rights on such matters. Indeed it may be argued that this observation put the Respondents on notice that the Complainant's acceptance of retirement was on this limited basis, and not a matter of personal choice such as could constitute a waiver of any legal claim that the Complainant might have.

While the Complainant never expressly asked to return to work until he made a verbal request to the Mayor, followed by a letter to the Police Commission on March 1, 1982, the letter of July 16, 1981 did express his preference to continue his employment. Consequently, the Respondents were aware throughout this period that the Complainant was willing to work if they chose to employ him. I conclude that there is no proper reason to deny the Complainant compensation for the loss of income as a result of his retirement from August 1, 1981, the first day of his retirement.

Different considerations apply with respect to interest during this period. While I may not be strictly bound by the law applicable to the courts on remedial matters because of the power conferred on a Board of Inquiry under the Code, I do believe it appropriate that I be guided by the same principles as the courts on matters such as interest.

At the time of the complaint, the relevant law on prejudgment interest in the courts was found in s. 36 of the Judicature Act, R.S.O. 1980, c. 223. That provision drew a distinction between liquidated and unliquidated claims. Interest ran on liquidated claims from the time when the claim arose, but in the case of unliquidated claims interest ran only from the date when the party liable was given notice of the claim. I believe that, among other things, this reflected concern that it was unfair to charge interest in the case of an unliquidated claim prior to notice because of the uncertainty surrounding such claims. This parallels the concern expressed by the Respondents in this case.

There is some similarity between a liquidated claim and the claim for loss of employment income resulting from the mandartory retirement of the Complainant since the amount of compensation can be calculated mathematically from the collective agreement. I am satisfied, however, that the claim is properly classified as unliquidated. It is not, after all, a claim for unpaid wages under the terms of employment, but rather a claim for wrongful termination which is not specifically dealt with by the terms of employment. Moreover, the process of determining what would have happened in the event that termination had not occurred, including

the question of mitigation, involves much uncertainty in the calculation of the amount, which is what characterizes an unliquidated claim.

It is not clear from the record when the Respondents first received notice of the claim, but it does seem apparent that they were aware of it no later than March 1, 1982 when the Complainant wrote his letter requesting reinstatement, after speaking about this to the Mayor. It is unlikely, on the other hand, that they were aware of it much before this, if at all, since the complaint was not filed until February 19, 1982. I would, therefore, allow interest as of March 1, 1982.

MITIGATION

The evidence indicates that the Complainant did attempt to mitigate during the period prior to filing the complaint and I would certainly find that those efforts were adequate. The Complainant filed a resumé for any opening in the Ontario public service, offered his services as an investigator to lawyers in the Stratford area, and checked regularly for openings through the Canada Employment Centre. While the Complainant made no efforts to seek employment with another police force, which would presumably be the employment to which he was most suited, the evidence before me concerning the views of police employers generally toward employees over age-60 convinces me, as presumably it did the Complainant, that any such efforts would have served no purpose.

In most situations, however, the submission that the steps taken by the Complainant to mitigate the loss were inadequate after the time when the complaint was filed would certainly have cogency. The Complainant admitted that he made no further efforts to seek other employment after filing the complaint. I assume that, in saying so, he was forgetting about routine checking with the Canada Employment Centre which he had testified took place over the one year period during which he was entitled to unemployment insurance. This period would have continued to the end of July, 1982, several months after he filed the complaint.

The Complainant was also uncertain as to the time when discussions with a Kitchener law firm about continuing employment as an investigator took place. These discussions were unfruitful since the law firm wanted someone resident in the Kitchener area and the Complainant, while willing to commute, was reluctant to change his residence. In light of the Complainant's general testimony that he did not pursue other employment after he filed the complaint, I think it more probable than not that these discussions took place prior to the filing of the complaint.

On this evidence, it is certainly open to question whether the Complainant made adequate efforts to mitigate after filing the

complaint. While the possibility of reinstatement in former employment would justify certain restraints on efforts to find other employment, for example, it would justify not undertaking a commitment to another employer which would interfere with availability for reinstatement, it certainly does not justify a complete failure to seek other employment to mitigate the loss.

On the other hand, the duty to mitigate only requires a person to act reasonably in seeking to reduce the loss. It does not require a person to seek and accept any and every available employment. A person is entitled to limit the search to employment reasonably comparable to that which the person previously held. In the circumstances of this case, the reasonable alternatives which the Complainant was required to pursue were quite limited.

The experience of the Complainant during the period before he filed the complaint demonstrated the limited prospects of the Complainant for suitable alternative employment. His canvass of law firms for investigatory work resulted in only a couple of assignments for separate firms, and in neither case did any repeat work result.

Moreover, although the duty to mitigate did not require him to do so, the Complainant did make himself available for other work as a bartender beginning in 1982. This demonstrates that he was indeed willing to undertake employment to mitigate, if such had been available.

While certainly the efforts of the Complainant to mitigate would have been inadequate in most contexts, I am satisfied that in the circumstances of this case these efforts met the requirement of reasonableness. Once it became clear that suitable employment was not available, as the initial search showed, there was no reason for him to continue such efforts. Indeed, the course which he took to pursue reinstatement through this complaint, and not invest his time in further efforts to find similar work, was not only a reasonable course of action, it was probably the most reasonable course of action in these circumstances. Thus, I conclude there was no failure to mitigate.

DELAY IN ADJUDICATION OF THE COMPLAINT

In principle there is also much validity in the submission of the Respondents that the final adjudication of this complaint has been excessively delayed and that, in so far as excessive delay was beyond the control of, and to some extent over the objections of, the Respondents, they ought not to be held responsible for additional loss to the Complainant as a result of such delay. Where there is a continuing tribunal in place, whether it is a court or an administrative body, concern over an accumulating loss can be dealt with by timely application to the tribunal which may then act to expedite the proceedings or impose terms as to the

allocation of further loss in the event the delay continues.

In this case, however, the very cause of significant portions of the delay was the absence of any tribunal that might address such questions. This leaves the problem of doing justice in these circumstances to be dealt with entirely after the fact when the additional loss has already occurred.

I agree with the principle as submitted by the Respondents that, where a loss is increased because of excessive delay beyond the control of a party, it may be appropriate to discount the claim against that party on the ground that it is not responsible for the delay-caused loss. I do emphasize the word "excessive", however. The resolution of disputes by adjudication is commonly a lengthy process which often results in a loss greater than would have occurred if the dispute had been resolved more expeditiously by agreement. Even though this additional loss is, in a sense, caused by the process, the burden of this loss follows the event - that is, a successful claimant recovers it from the party liable while an unsuccessful claimant is left with an increased loss.

I am not persuaded by the Respondents' argument as to how the principle should be applied in this case. In the first place, the Respondents' submissions tend to underplay their own responsibility for delay.

The record before me contains very limited information as to the course of the proceedings on this complaint prior to my own appointment on September 29, 1988. The evidence consists primarily of relevant correspondence presently in the files of counsel for the Respondents which was submitted as Exhibit D-3 with the consent of the Commission.

It is evident that this complaint, together with others involving mandatory retirement of firefighters and police officers, was referred to a Board of Inquiry consisting of John D. McCamus sometime prior to June of 1985. It was apparently intended by the Commission that these complaints be heard together because of the common issues involved. Professor McCamus scheduled hearings on that basis to begin on June 17, 1985.

By letter of June 5, 1985, which was preceded by some verbal communication with the Commission, the Respondents advised Professor McCamus that they objected to this joint hearing and wished the Complainant's case to be heard separately. On the understanding that Professor McCamus was not available during the remainder of the summer, they also indicated that they would prefer hearing dates in the fall of 1985, both because the counsel they had retained was unavailable for the scheduled June dates and because time was needed to make scheduling arrangements with their witnesses.

Professor McCamus at the commencement of the June hearings ruled that he would hold two separate hearings - one with respect to the firefighters and one with respect to the police officers. He proceeded with the former hearing, and adjourned the latter sine die. The record before me does not reveal his reasoning in making this ruling. He proceeded to hear and decide the firefighter cases before returning to the scheduling of the police officer cases. His decision on the firefighters was issued on December 5, 1986. When it appeared impossible to find dates agreeable to all parties prior to a scheduled leave planned by Professor McCamus for eight months beginning in mid-fall, 1987, Professor McCamus resigned as the Board of Inquiry for the police officer cases on June 30, 1987.

In the meantime the Respondents indicated during 1985 that they wished to schedule dates to proceed with the Complainant's case. The files of Respondents' counsel contain two letters to the Commission's counsel to this effect dated July 22 and October 24 respectively. The record does not reveal whether or to what extent there may have been related verbal communications.

The next relevant written communication on the Respondents' file is a letter of December 11, 1986 from Professor McCamus, after his decision on the firefighter cases, indicating his availability as to dates from January into the summer of 1987. As a result, the Respondents wrote the Commission, through counsel, on January 28, 1987, suggesting dates after May 1, but also raising the question whether the Commission indeed wished to proceed since the firefighter decisions had upheld mandatory retirement at age-60.

The preference for dates after May 1 was based in part on the Respondents desire to schedule a single block of dates for the entire hearings. Professor McCamus had indicated that he could only be available for one or two days at a time before May, although he did offer the entire first week of March. The Respondents also indicated that some further preparation was needed before they would be in a position to proceed. The same letter indicated that the Respondents were considering the option of seeking judicial review to terminate the proceedings in light of the delay.

It appears that the parties had difficulty finding agreeable dates sufficient to complete the hearing during the summer of 1987. This was confirmed by Professor McCamus' letter of resignation. As indicated by a letter of May 7, 1987, under the signature of counsel for the Commission, the parties agreed to ask Professor McCamus to resign, presumably in awareness of his sabbatical plans. The letter also indicated that Professor McCamus agreed with this suggestion. The record does not show what transpired during the two months before he actually did so, but it is of course possible that there were implications relating to the resignation that needed to be dealt with before he proceeded.

The next correspondence from the Respondents' file shows discussions took place in January and February, 1988, with the Respondents suggesting dates in August or November of 1988. The second Board of Inquiry, consisting of Ian A. Hunter, was appointed on March 8, 1988. The hearing was scheduled to commence on March 22, but this was only for the purpose of settling actual hearing dates, as has become the practice in order to ensure formal compliance with the 30-day limit on commencement of the hearing under the 1981 Code.

At this hearing, dates in October and November, 1988 were tentatively set, but the Respondents were represented by counsel other than the counsel retained to represent them at the hearing. It transpired that the counsel retained to represent the Respondents' was not available on these tentative dates. The Commission and the Respondents were agreed that they wanted a single block of time sufficient for the hearing. Professor Hunter had no such block of time available until the spring of 1989. Rather than delay the hearing that long, he resigned on April 26, 1988.

Since there is evidence on this aspect on the record both with respect to Professor McCamus' availability during the winter of 1987 and Professor Hunter's availability during the fall of 1988 and the winter of 1989, I think it appropriate to observe that the system of human rights adjudication in place in Ontario, which is also common elsewhere in Canada, makes it difficult to schedule a single block of time sufficient for a hearing in a complicated case, except during the summer months. Most Board of Inquiry members are university teachers, which means that they have scheduled commitments to students during the academic year from September through April. Given the indications, both during 1987 and 1988, that at least one large block of hearing time was desired during the fall and/or winter months, it is quite probable that at least parts of the delays in reappointing a Board were attributable to the problem of finding a Board member able to provide such a block of time.

Since the period of delay submitted to be excessive includes the time that this matter was before me, I will continue this review of the chronology up to the date of this decision. The actual hearing before me commenced on February 27, 1989 when two weeks of hearing dates were scheduled. Because of difficulties with the availability of witnesses, the parties agreed to adjourn on March 6.

The next available dates agreeable to all parties were in September and a further block of time was scheduled for then. The next delay resulted when I received medical advice early in August that it was doubtful if I would be physically able to conduct the hearing in September. I did indicate that it was possible I would be able to proceed, but the parties preferred not to risk cancelling

arrangements with their witnesses at the last moment if I was unable to do so. It was not possible to immediately agree upon new dates, although I advised the parties that I should be able to proceed by November. It transpired that mutually available dates could not be found until April 25, 1990, at which time the parties again experienced difficulty with the availability of witnesses. I would note that it was perhaps somewhat ironic that, in the end, it was by utilizing time in relatively short blocks that we were able to accommodate everyone. Except for some items needed to complete the record, the hearing of evidence was completed on June 13, 1990.

The parties agreed that they needed time to prepare argument and a hearing for that purpose was scheduled for early September. It was subsequently postponed to October 25-26, however, to accommodate counsel. As already indicated, my decision was issued on November 21, 1990. I was subsequently advised to file the record in the Divisional Court since an appeal had been filed by the Respondents.

Since, in so far as delay in adjudication is involved, the Respondents have asked only for a limit on compensation with respect to the interest accruing since 1986, it may be asked whether delay prior to that time has any relevance. I think it does since any limitation of compensation on this basis must be related to an excessive delay beyond the control of the Respondent. Whether the delay was excessive and beyond the control of the Respondent can only be determined by examining the total time period involved and the responsibility, if any, of the Respondents for delay throughout that period.

Up until the hearing dates originally scheduled by Professor McCamus in June, 1985, the time which passed, while regrettable, was not unusual in the processing of human rights complaints. The time period to be considered, therefore, as to whether there was excessive delay in adjudicating the complaint is from the appointment of the first Board of Inquiry in 1985 until the present.

The Respondents cited their efforts to obtain dates for a separate hearing in the latter half of 1985 as a reason for limiting their liability for the loss by denying interest after 1986. If hearing dates had been set in response to the Respondents' request, the end of 1986 might be a realistic projection as to when the matter could have been completed. By that time the mandatory retirement of the Respondent would have been lawful in any event so that there was no further loss of employment income. The loss for future pension benefits would also have fully matured at that stage. Thus, the only loss continuing to accrue after 1986 was interest.

I am not, however, persuaded that the Respondents are free of any responsibility for the delay that occurred as a result of the

original joint scheduling of the various mandatory retirement cases and the indefinite adjournment which ensued when the Respondents sought a separate hearing.

It appears that the Respondents first engaged the law firm which presently represents them in this matter during the period leading up to the hearing dates scheduled for June, 1985. The record does not indicate how those dates originally came to be set, but it does indicate that some two weeks of hearing time had been set aside. I find it hard to believe that this was done without some prior consultation with the Respondents through counsel. While the Respondents changed counsel around this time, they are responsible for the conduct of both the counsel before and the counsel after the change.

I doubt that there was an initial hearing to set dates since I would expect the Respondents' letter of June 5, 1985, written by prior counsel, to have referred to any such hearing. This letter indicates that the Respondents first became aware of the proposed hearing dates by a letter of April 11, 1985, received on April 17, from the Office of Arbitration, which would have been responsible for the appointment of the Board at the time. Without further evidence, I cannot know for sure whether the Office had earlier asked the parties about their availability, but I would certainly expect that to have been its normal practice.

The letter of June 5 refers to the April 11 letter as being the first indication of the specific hearing dates, which does not necessarily mean it was the first notice that the matter was going to a Board of Inquiry. I think it improbable that this was the first the Respondents had heard of the plan to hold hearings. In any event, the Respondents had notice by April 17 at the latest that matters were proceeding in this way.

In view of the legal requirement that a hearing commence within 30 days of the appointment of a Board, the Respondents ought to have been aware, at least through counsel, that they might expect a Board appointment to occur within the 30 days preceding the proposed hearing dates, unless of course a Board had already been appointed and an initial hearing set for the purpose of protecting jurisdiction. Either way, I think there was an onus on the Respondents to have acted sooner than they did if they objected to the hearing plans of which they were aware by April 17.

If there was already a Board appointment and an initial hearing scheduled, the timely point at which to raise the Respondents' objection to joint hearings on the various complaints was at that initial hearing. Since there was a formal notice of hearing dated May 27, that is, within the 30-day period prior to the hearing, I think it more likely that the actual appointment of the Board was concurrent with this notice of a pre-arranged block of hearing time. If no Board had yet been appointed when the Respondents

received the letter of April 11 from the Office of Arbitration, the timely action would have been to inform the Office of Arbitration of their concerns about the proposed joint hearing before the pending Board appointment and hearing dates were confirmed. Otherwise, it could be expected that the Office would proceed as indicated in its letter of April 11 and, once that happened, there would inevitably be delays if the Respondents wished to pursue their preference for a separate hearing.

In the absence of further evidence, I conclude that the first the Respondents made known their objection to the planned joint hearings was by a telephone call of May 31 to the Commission, referred to in the letter of June 5 letter, and by the June 5 letter itself addressed to the Board. In light of this, I think they bear some responsibility for the delay that ensued because by that time separation of the hearings was not as easy as it might have been at an earlier stage.

Moreover, I think the Respondents also contributed to the extended delay which occurred in the Complainant's case at this stage because of the unavailability of the Respondents' counsel at the time of the June 17 hearings. Again, I think there was some onus to advise the Office of Arbitration of this promptly when the letter proposing those dates was received.

The June 5 letter suggests that there may have been some predisposition of the Commission, which was responsible for carrying the complaints before the Board, to give priority to the firefighter cases. Thus, the police officer cases might have been delayed in any event. This was virtually assured, however, when the Respondents failed to give notice of the unavailability of counsel for the June 17 hearings until after those hearing dates were actually confirmed. It was the only way to usefully employ the scheduled hearing time if the Respondents in this case were unready to proceed.

Further, once the hearings of the firefighter cases began, it was certainly reasonable for the Board to attempt to conclude these cases first. Otherwise, extended delays in both cases were likely. Proceeding as expeditiously as possible to a decision in one case also had the potential efficiency that this decision might produce a settlement in the other case, although this did not of course happen in the end.

The efforts of Respondents to obtain hearing dates as the other cases were proceeding are certainly laudable. In the end, however, they never took a firm position that they wanted the matter brought to a conclusion as soon as possible. Instead, they ultimately acquiesced in the ongoing delays. Moreover, there would appear to be some inconsistency between the Respondents' claim of objections to the delay during 1985 and 1986 and the observation in the letter of their counsel to the Commission on January 28, 1987 that there

was still preparation to be completed before they would be ready to proceed. Thus, I conclude that delays up to the end of 1986 were as much or more contributed to by the Respondents as they were the subject of objection by the Respondents.

During the period after the end of 1986, there are a number of delays that are unexplained on the record. I have already mentioned the two-month period between Professor McCamus' agreement to resign and his actual resignation. There was a period of eight months before a new Board was appointed. Then some five months passed from the second Board's resignation until my appointment.

On the other hand, there is the procedural complication that the Human Rights Commission has to act to request a new Board following a resignation. This may take some time in light of the Board's meeting schedule. The record indicates, to illustrate, that nearly three months passed between Professor Hunter's resignation and the Board's request for a new appointment. Whatever was involved in this passage of time, I have no reason to believe that it was other than part of the normal process and not, therefore, a justification for limiting the liability of the Respondents. Given the potential difficulty in finding a Board member who could meet the parties' demand for a single block of hearing time, I do not find the further two-month delay pending my appointment to be excessive.

I have already indicated that there may have been a good explanation for the delay in Professor McCamus' resignation and I am not willing to treat that two-month delay as a basis for concluding there was excessive delay. The subsequent eight-month delay in replacing him does beg for some further explanation, even if it is reduced by a possible three-month period awaiting action by the Commission. Since there is no explanation of this delay, I would be prepared to consider it an instance of excessive delay. Before I limit the compensation to the Complainant on this basis, however, I think it appropriate to take a broader look at the delays which occurred after 1986 and the role of the Respondents in those delays.

Among the principle causes of delay after the end of 1986 were difficulties in finding hearing times mutually convenient for the Board and counsel for the parties. While the Board itself and counsel for the Commission were undoubtedly responsible for some of these difficulties, it is also evident from the record that the counsel retained by the Respondents to actually represent it at the hearings had a very busy schedule with only limited availability that had to be scheduled well in advance. This was evident even in the initial representations to Professor McCamus in 1985. It was clearly a major factor in the overall delay experienced in the disposition of this complaint.

It is a fact that the Commission appears to have proceeded on the same basis in this matter. Thus, there were also delays that were

undoubtedly attributable to the unavailability of counsel for the Commission. The point, however, is that in the overall picture of the delays in this case the Respondents gave as well as they got. If a party respondent is responsible for delays of a particular nature, it is not in a good position to claim that comparable delays, regardless of which party is responsible in a particular instance, justify a limitation of the compensation for the loss which has occurred to the other party and for which the party respondent is found liable at the end of the proceedings. Consequently, while the delay in the adjudication of this case was undoubtedly excessive in any common sense view of the matter, it cannot be said that this delay was beyond the control of the Respondents to the extent that they should not be held liable for the full economic loss to the Respondents.

The delays which occurred while the matter was before me were of the same nature. While the adjournment related to my health was an additional factor that was clearly beyond the control of the parties, in the overall context of the case this delay was insignificant. Again it was the unavailability of counsel for the parties - the Respondents as well as the Commission - that was primarily the cause of delay.

Finally, in so far as the complaint continues without a final resolution to this date, the delay since the date of my decision on November 21, 1990 is clearly attributable to the Respondents since it results from their appeal of my decision. Thus, even if I were to rule that interest should not accrue for some period after 1986, clearly interest should accrue for the period since November 21, 1990.

Even if I am wrong in concluding that I should not limit the liability of the Respondents on the basis of those particular delays beyond their control, there is another reason why I would not limit the remedy in this case by denying accrual of interest since 1986. That is precisely because the loss in question is purely a matter of interest.

I have already noted that the loss of employment income and of pension entitlement had fully matured during 1986 when mandatory retirement of the Complainant would clearly have been lawful under the Code after the Complainant reached age-65. The only loss really accruing after 1986 was interest. Interest constitutes compensation for the loss of the use of money that should have been paid at an earlier time. A party liable for interest enjoys the offsetting advantage of having the use of the money in question while interest is accruing.

It is true that, as the Respondents submitted, a party whose liability has yet to be determined may not make actual provision for funds to cover its potential liability and thus fail to take advantage of the use of this money pending the outcome of the

proceedings. On the other hand, a party that fails to make such a provision, knowing that it has a potential liability under litigation, necessarily accepts some risk as to its ability to cover the loss in the event that it is unsuccessful.

Increasing loss based on accruing interest is fundamentally different from other accruing loss where the rights of the parties are unresolved and in the process of litigation. The resolution of the rights of the parties is conducive to the avoidance of other loss since, once their rights are determined, the parties can adjust their conduct to avoid further loss without any prejudice to their rights. Thus, in this case, a determination prior to 1986 that the mandatory retirement of the Complainant violated the Code could have led to actual reinstatement with the result that the Respondents would at least have received the benefit of his services in exchange for the income for which they are liable.

Because interest is compensation for the use of money, however, no question of loss avoidance arises. The party ultimately liable either has the actual use of the money or the saving of not having to find funds for this purpose until liability is determined. In either case, it has had an advantage as a result of the delay which is approximately equal to the interest to which the successful party is entitled. Thus, there is no reason in justice to limit an award of interest because of delay in the adjudication of the dispute.

CALCULATION OF THE LOSS OF INCOME

This brings me to the task of actually calculating the loss of income for which the Complainant is entitled to compensation. As already noted, the evidence as to amount consists of an assessment by Peat Marwick Thorne, Chartered Accountants, filed as Exhibit D-2 by the Commission with the consent of the Respondents.

I do not interpret the consent of the Respondents as an actual agreement to the contents of Exhibit D-2. On the other hand, they consented that it should be placed on the record without testimony or cross-examination as to its contents. The Respondents also accepted that Exhibit D-2 was a reasonable calculation of the loss experienced by the Complainant as a result of retirement at age-60, rather than age-65, this being separate of course from the question of the extent to which the Respondents should be required to compensate for that loss. Also at the close of submissions, both parties indicated that I should make a final determination as to the amount of the loss on the basis of the evidence before me. In light of this, I think it appropriate for me to base my findings as to the actual amount of the loss as calculated in Exhibit D-2, rather than to attempt to go behind that calculation.

I would also observe at the outset that, while Exhibit D-2 is quite

helpful, there is a potential problem with it. While Exhibit D-2 provides a breakdown of the amount of the loss into its main elements, such as loss of employment income and loss of pension benefits, and according to significant time periods, it does not provide full information as to the way in which these amounts were actually calculated.

Consequently, in the event that I thought it appropriate to proceed on a different basis than that followed in the preparation of Exhibit D-2, there would be considerable difficulty in actually doing so. Without further information as to the underlying calculations, it is impractical to go behind many of the figures set out in Exhibit D-2 income. In light of the Respondents' acceptance of the figures in Exhibit D-2 as reasonable, therefore, I will not attempt to go behind those figures.

For the period from August 1, 1981, when the Complainant's retirement began, through April 30, 1986, when retirement was clearly permissible under the Code, the Complainant lost employment income for salary, overtime, service pay and, upon retirement, unused sick leave. For the purposes of Exhibit D-2, it was assumed there would have been overtime at the rate of 400 hours a year and that seven days of sick leave would have been used during the entire period. Again, the Respondents did not challenge these assumptions.

The yearly amounts for loss of employment income according to Exhibit D-2 are: 1981 (Aug.-Dec.): $13,125; 1982: $34,485; 1983: $36,534; 1984: $38,344; 1985: $40,340; 1986 (Jan.-Apr. and sick leave payout): $20,919.

The Commission also adduced evidence of other income from the Complainant's part-time employment as a bartender during 1982 through 1985 in the following amounts: 1982: $42; 1983: $674; 1984: $864; 1985: $640. While Peat Marwick Thorne had access to this information, it is not evident that they took it into account in the preparation of Exhibit D-2. Thus, I conclude it is appropriate to offset this against the loss of employment incomes, resulting in the following net figures for these years: 1982: $34,443; 1983: $35,860; 1984: $37,480; 1985: $39,700.

During this period, the Complainant was in receipt of a pension which he would not have received if employed. Because pension benefits were adjusted on July 1 each year prior to January 1, 1991, when the adjustment date changed to January 1, in Exhibit D-2 the pension is calculated on the basis of the 12-month period July 1 through June 30. I have related these amounts instead to the calendar year, using the assumption that they were paid in equal monthly instalments.

The yearly amounts received for pension income through December 31, 1985, according to my calculations based on Exhibit D-2, are as

follows: 1981 (Aug.-Dec.): $5,001; 1982: $12,242; 1983: $12,732; 1984: $13,241; 1985: $13,770. These amounts have to be offset against the loss of employment income.

The calculation of the effect of pension income for 1986 is more complicated. The Complainant received pension during January through April which he would not have received if employed. On the other hand, for the remainder of the year his pension was less than it would have been if he had continued employed until April 30, 1986 since the additional years of pension credit and higher salary after his retirement in 1981 would have increased his pension entitlement. The pension he received during 1986, according to my calculations based on Exhibit D-2, was $13,493. If he had retired on April 30, 1986, he would have received a pension of $11,955. Thus, he actually received more pension that year that he would have if he had not retired until April 30, by the amount of $1,538 which again has to be offset against the loss of employment income.

There is a further complication in the calculation of the loss for the period 1981-1986 in view of the claim for loss of pension benefits as a result of the age-60 retirement. Throughout this period the Complainant, if employed, would have had to make pension contributions towards those future benefits. In view of the claim for loss of pension benefits, fairness requires that the amount of these contributions be deducted from the claim for loss of employment income.

While I have indicated that I will not attempt to go behind the calculation in Exhibit D-2, in the case of the assessment of pension contributions there is, in my view, a clear error on the face of Exhibit D-2. In determining the difference in pension contributions between the Complainant's retirement at age-60 and the contributions in the event he continued working to age-65, Exhibit D-2 proceeds on the basis that pension contributions after 1976, when the retirement age for the purpose of the pension plan was changed to age-60 from age-65, should all be recalculated on the basis of age-65 retirement, rather than age-60 retirement. This strikes me as preposterous. The legal conclusion that mandatory retirement cannot be imposed at age-60 has no effect on the continued operation of the pension plan on the basis that the normal retirement age will be age-60. Thus, there would have been no change in the contributions the Complainant had already made for the period up to July 31, 1981.

I have no evidence before me as to whether the operation of the pension plan might have entailed some adjustment to the Complainant's contributions to reflect the delay in his expected date of retirement in the event that he had continued in employment beyond July 31, 1981. The best evidence as to the contributions that would have been made during this period is the calculation of contributions on Exhibit D-2.

I have some doubt about the correctness of this calculation since this again reflects the assumption that contributions should be entirely adjusted on the basis of age-65, rather than age-60, as the normal age of retirement. If, for example, actual contributions for this period continued to be based on a normal retirement age of 60, the contributions would have been higher. This would involve going behind the calculations in Exhibit D-2, however, so I think the better course is to use those figures as the appropriate amount to offset against the loss of earnings during this period. Thus, the figures for pension contributions are as follows: 1981 (Aug.-Dec.): $827; 1982: $2,166; 1983: $2,280; 1984: $2,372; 1985: $2,473; 1986 (Jan.-Apr.): $827.

For the period from January 1, 1987 through December 31, 1991, the Complainant has received less pension than he would have received if he had been allowed to continue his employment to age-65. This will, moreover, continue for the rest of his life. Exhibit D-2 was prepared in July, 1991, and as a consequence assesses the difference in pension received through June 30, 1991, and calculates the loss of pension for the remainder of the Complainant's life expectancy, to July, 2004, as a loss of future benefits. By the time of the hearing, these figures could have been updated to December 31, 1991 and, since I have determined the amount of the loss in calendar year units, I prefer to award compensation on that basis.

It is easy to determine the amount of pension loss for the full 1991 year since it may be assumed that, with the annual pension adjustment having been made on January 1, pension for the last six months of 1991 would be the same as pension for the first six months. There was an additional payment in January, 1991 on account of the change in annual adjustment dates, but this was a one time payment which is separately identified by Exhibit D-2.

The difficulty which arises is in correctly determining the appropriate corresponding adjustment to loss of future benefits for the period of July through December, 1991 because of the absence of supporting calculations in Exhibit D-2. It is indicated that the assessment of future benefits was discounted by 2.5% on the basis of Rule 53.09 of the Rules of Civil Procedure, so it may be that all that is necessary to make the correct calculation of the loss of future benefits attributable to July through December, 1991 is to reverse the effect of this discount on the actual loss for this period.

On the other hand, it is possible that there were other actuarial adjustments not mentioned in Exhibit D-2. Again, since I am unable to go behind the calculations in Exhibit D-2, on the basis of the evidence available, I will simply deduct the actual loss of pension income for this period from the amount assessed by Exhibit D-2 for loss of future benefits. This may result in under-compensation because the 2.5% discount for this period has not been reversed,

but this is the best determination possible on the evidence before me.

On this basis, the loss of pension income from 1987 through 1991 was as follows: 1987: $4,603; 1988: $4,797; 1989: $4,994; 1990: $5,092; 1991: $5,413. Of this, $2,653 pertains to the period of July through December, 1991 and has, therefore, to be deducted from the claim for loss of future pension benefits after June 1, 1991.

As I have already mentioned, the assessment of the loss of future benefits in Exhibit D-2 was discounted by 2.5% on the basis of Rule 53.09 of the Rules of Civil Procedure. As I have indicated, even if I may not be strictly bound by the rules applicable to the courts, I think it appropriate to be guided by them. I would, therefore, adopt the assessment of future loss in Exhibit D-2 at $56,770, subject to the deduction for July to December, 1991 referred to above. Accordingly, the loss of future pension benefits from January 1, 1992 through the life expectancy of the Complainant is $54,117.

INTEREST

This brings me to the matter of interest. The Commission made submissions which appear to have been based, in part at least, on provisions which originated in amendments to s. 138 of the Courts of Justice Act, S.O. 1984, c. 11, as made by S.O. 1989, c. 67, s.6, and now appear as s. 128 of R.S.O. 1990, c. C.43. This creates a small problem with these submissions since, if I use for guidance the law applicable to similar cases in the courts, the applicable law is clearly not the present s. 128, but s. 36 of the Judicature Act, R.S.O. 1980, c. 223. These 1989 amendments were expressly made inapplicable to proceedings already in progress.

The Commission proposed that the rate of interest be varied annually and suggested interest rates for each year. For the period 1981 through 1984, the Commission for some reason proposed one rate which it considered a conservative estimate of rates during that period, rather than the actual court rates. The rate proposed at 12% was indeed conservative since the court rates were much above 12% during most of this period. The court rate which is prima facie applicable for the entire past loss in this case, for example, would be 16.5%.

For the period from 1985 through 1991, the Commission proposed rates based on an annual averaging of the court rates, which have been established quarterly since 1984. The rates proposed for this period varied between 10% and 14.5%. Since the court rate for the first quarter of 1992 is not yet known, the Commission proposed 8% as a realistic rate for the period since December 31, 1991.

Further, with respect to the periodic calculation of interest, the

Commission proposed that interest be calculated at 12-month intervals, while both the Judicature Act and the Courts of Justice Act provide for the calculation of interest at 6-month intervals.

The Respondents indicated that, as with Exhibit D-2, they considered the figures submitted to be reasonable, again this being separate from the question of the extent to which the Respondents should be required to pay interest.

Discretion to vary the rate of interest has been authorized in the courts throughout the relevant period. While this might allow a varying interest rate, this discretion ought to be exercised judicially. The only reason for variation suggested by the the Commission was the actual change in interest rates over time. While 1984 amendments to this discretion have recognized changing rates as a ground for varying the rate, they still contemplate adopting one rate. Thus, I do not think the changing rates in themselves a sufficient reason for adopting a varying rate.

On the other hand, if I were to adopt the prima facie rate provided by the Judicature Act, this would result in interest far higher than that proposed by the Commission. This would be unfair to the Respondents since, if the Commission had proposed such a rate, the Respondents would likely have argued for a reduction in the rate, particularly since that rate was higher than the rates for most of the subsequent period.

Even if I adopt the more conservative rate proposed by the Commission for 1982, this would tend to result in interest which is higher, albeit only slightly, than the variable rate proposed by the Commission. This again would be potentially unfair to the Respondents. My actual award for interest would be lower than the total proposed by the Commission, but this would be because of other adjustments I have made, not because of the rate of interest. In particular, the Commission's submissions did not offset pension contributions against the loss of income during 1981-1986 when calculating interest, which has a substantial affect on the total.

I also have another reservation about the 12% rate which the Commission proposed for 1982, the time when the complaint was initiated. There appeared to be no real basis for proposing it other than that it was a conservative approximation of rates during the period. I do not think that is an adequate basis on which to establish the rate of interest. Since it is not a real rate, I am also reluctant to blend it with the other rates proposed.

In light of the basis on which the rates proposed by the Commission were arrived at, I think the appropriate rate, which is consistent with fairness to all parties, is that proposed for 1985, the year when this matter first went to a Board of Inquiry, since that is when the complaint was actually submitted to adjudication. The average of the quarterly court rates during 1985 was 11.75%. This

yields a result over the total period of the loss which is somewhat less than that from the variable rates proposed by the Commission, but not an unreasonably lower result. It is also the median rate over the entire relevant period.

With respect to the intervals at which interest should be calculated, I am again concerned about fairness to the Respondents if I followed the normal court rule based on 6-month intervals. Again, were it not for the other adjustments I have made, this would result in a higher award of interest than the 12-month intervals proposed by the Commission. Had the Commission proposed 6-month intervals, the Respondents might have made submissions that I should exercise my discretion to vary this.

It would also be difficult to accurately calculate interest at 6-month intervals on the evidence because the assessment of the loss in Exhibit D-12 was based on 12-month units. In the case of loss of employment income and pension contributions, these units were based on the calendar year. While the loss of pension income for most of the period was based on July through June units, these can readily be broken into 6-month units since it is fair to assume pension was paid in relatively equal monthly amounts and the times at which the payments increased are noted in Exhibit D-2. The same cannot be said of employment income since there is insufficient detail in Exhibit D-2 to reliably determine the income on a 6-month basis.

Considering the submissions of the Commission and the position adopted by the Respondents based thereon, and in light of the state of the record with respect to the loss of employment income in Exhibit D-2, I think it appropriate to use 12-month intervals on a calendar year basis for the calculation of interest.

I have already set out my decision that interest should not commence until March 1, 1982 after the Respondents became aware of the actual complaint. Thus, the first calculation of interest will be based on the loss during the calendar year 1981, but applied for the period from March through December, 1982. Thereafter, interest for each year, and the period from January 1, 1992 to the date of this decision, will be calculated on the accumulated loss, not including interest, as of the end of the previous calendar year.

The Commission also made submissions as to the effect of interest on the loss of future pension benefits for the purpose of offsetting this amount against the interest on the loss already accrued. As I understand Exhibit D-2, although it does not address the question of interest on past loss, it does adjust for the opportunity of the Complainant to earn interest on any compensation for future loss. This is indicated by the 2.5% discount for the difference between anticipated future investment rates and future pension increases. Thus, I do not think any further reduction based on future interest is appropriate.

I do recognize that a question of fairness arises here since the Respondents might have made submissions on this matter if the Commission had not proposed a reduction for interest on future loss. On the other hand, I cannot conceive on what basis a properly discounted award for future loss might be reduced again on account of interest. Consequently, I do not think I should make any such reduction.

SUMMARY OF LOSS

In light of the above considerations, I determine the loss to be as follows (offsetting amounts are enclosed in brackets):

Year	Employment Income	Pension Income	Pension Contrib.	Net Loss	Interest
1981	13,125	(5,001)	(827)	7,297	
1982	34,443	(12,242)	(2,166)	20,035	714
1983	35,860	(12,732)	(2,280)	20,848	3,212
1984	37,480	(13,241)	(2,372)	21,867	5,661
1985	39,700	(13,770)	(2,473)	23,457	8,231
1986	20,919	(1,538)	(827)	18,554	10,987
1987		4,604		4,604	13,167
1988		4,797		4,797	13,708
1989		4,994		4,994	14,271
1990		5,092		5,092	14,858
1991		5,413		5,413	15,457
1992					1,341
TOTAL	181,527	(33,624)	(10,945)	136,958	101,607

In summary, the Complainant is entitled to loss of past income totalling $136,958, together with interest on this in the amount of $101,607. In addition, the Complainant is entitled to $54,117 for loss of future pension income.

POST-DECISION INTEREST

It also seems appropriate that the Complainant should receive interest on this amount from the date of this decision until it is paid. This should include interest on the amount for loss of future income. This amount has already been discounted to offset the benefit to the Complainant from receipt of this amount before it would have been received as pension. This assumes that the Complainant would have the opportunity to invest this money. If this amount is not paid promptly, the Complainant will lose the opportunity to invest it and, as a result will have been under-compensated. Post-decision interest will compensate for this loss.

While I think it proper to order post-decision interest in any

event, I am reinforced in this conclusion by the fact that enforcement of any remedy in this case will prima facie be stayed since my decision on the matter of liability is already under appeal. In the event my decision is sustained by the courts, it would be quite unjust to the Complainant if his compensation were still substantially diminished by a lack of interest covering the period while this case may yet be before the courts.

This leaves the matter of the appropriate rate of post-decision interest. For this purpose, it seems appropriate to be guided again by the rule applicable in the courts. Prima facie this would involve applying the adjusted bank rate for the quarter prior to the date of my decision. The submission of the Commission with respect to the interest rate appropriate to apply to past loss during 1992 indicates, and I could perhaps take notice, that interest rates generally have been moving to lower levels recently. On this basis, there might be an argument for exercising discretion to set a lower rate.

On the other hand, given the history of interest rates and the particularly low point of rates at this time, there seems every reason for uncertainty as to the future of rates during the period that this matter may remain under litigation. Rates were already in decline during the quarter which determines the prima facie rate. If events prove the prima facie rate to have been unreasonable, the rate can be adjusted by the courts during the appeal process. Consequently, I think it appropriate to simply order interest at the rate that would ordinarily apply if my order were a court order.

OTHER REMEDIES AND ORDER

The Commission made no submissions with respect to other remedies. Consequently, no other remedies have been considered.

An order based on this decision is attached.

DATED at Windsor, Ontario.
3 February 1992

Robert W. Kerr

Robert W. Kerr
Board of Inquiry

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1990, c. H.19; and

IN THE MATTER OF THE COMPLAINT OF Albert Large
AGAINST the Corporation of the City of Stratford,
the Stratford Police Department, and
the Board of Police Commissioners,
dated February 19, 1982, alleging
discrimination in employment on the basis of age.

BETWEEN:

ALBERT LARGE,
Complainant,

and

CORPORATION OF THE CITY OF STRATFORD,
STRATFORD POLICE DEPARTMENT, and
BOARD OF POLICE COMMISSIONERS,
Respondents,

and

ONTARIO HUMAN RIGHTS COMMISSION,
Commission.

ORDER

WHEREAS by decision of November 21, 1990, it was found that the Respondents discriminated in employment against the Complainant on the basis of age contrary to the Ontario Human Rights Code, and

WHEREAS by decision of February 3, 1992, it was found that the Complainant suffered loss in the amounts stated in the specific provisions of this order;

IT IS ORDERED:

1. THAT the Respondents pay the Complainant the amount of $136,958 for loss of income and pension benefits during the period from August 1, 1981 through December 31, 1991.

2. THAT the Respondents pay the Complainant the amount of $101,607 for interest on the loss of income and pension benefits for the period from March 1, 1982 through January 31, 1992.

3. THAT the Respondents pay the Complainant the amount of $54,117 for loss of future pension benefits during the period from January 1, 1991 through the remaining life expectancy of the Complainant.

4. THAT the Respondents pay interest on the total of the amounts set out in paragraphs 1, 2, and 3, from the date of this decision until payment of these amounts, at the rate of interest that would ordinarily be applicable if this were a court order under the Courts of Justice Act.

DATED at Windsor, Ontario.
1 February 1992

Robert W. Kerr
Board of Inquiry